Notes on Acts and Laws

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(ii) it be exclusive.

(a) Exceptions.

§ The Rule of Best Evidence:

1. It is an incontrovertible proposition of law that the party who is to prove any fact must do it by the **best** evidence of which the nature of the case is capable.

2. This rule, really speaking, underlies the whole law of Evidence.

(i) It is because of this rule that the law requires as a condition precedent to the admissibility of Evidence that there should be an open and visible connection between the principal and evidentiary facts.

(ii) It is because of this rule that the law requires that Evidence in order to be receivable should come through proper instruments.

(iii) It is because of this rule that the law requires that the evidence to be admissible should be original and not derivative.

3. At one time the rule of Best Evidence was very strictly applied. But its application is now greatly relaxed and what were once objections to admissibility now went merely to sufficiency on weight.

4. But the rule still survives and is illustrated by the requirements of the law of evidence in respect of oral Evidence and documentary evidence.

§ Oral Evidence:

1. The rule of best Evidence requires that if the evidence is oral then it must be direct.

2. This rule is embodied in section 60 of the Evidence Act.

3. What is meant by Direct Evidence ?

4. The answer that is commonly given is that oral evidence must not be hearsay evidence. This leads to the consideration of hearsay evidence.

The rule excluding Hearsay is subject to three main classes of Exceptions:

(i) Admissions and Confessions : Statements made in the presence of the party.

(ii) Statements made by persons since deceased. (iii) Statements made in public Documents.

§ What is hearsay evidence:

1. Hearsay evidence has been defined in many different ways :

(i) All Evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person.

(ii) The statement as to the existence or non-existence of a fact which is being enquired into, made otherwise than by a witness whilst under examination in Court can be used as evidence.

2. Hearsay evidence is evidence reported by witnesses of statements made by non-witnesses.

§ Why hearsay evidence is excluded ?

1. When A sworn in Court, details something which he did not see with his own eyes immediately but which he heard from B immediately he is not giving expression to the evidence of his own bodily senses, but is the medium merely of communicating that which save third unsworn person has said he saw. He is bringing evidence to birth, *obstetricante manu,* with the hand of a midwife; and is a mere channel or conduct pipe for communicating the information of a party not before the Court. A may most correctly and truthfully report what has been related to him, but it is never the less apparent that the real truth of the original statement cannot under such circumstances be tested. The originator of the report is not subjected to an oath or to Cross Examination *Non Constat* but he may have spoken idly or jocularly ; and he would be unwilling to repeat on oath what he had not hesitated to narrate in ordinary conversation. *Non constat* that he might not have wilfully fabricated a story or been the dupe of some one still farther hid behind the scenes or that though perfectly veracious as to intention, he might have been the victim of his faulty impressions or unretentative memory ; and so have utterly broken down, if only exposed to the test of Cross Examination. Therefore the law determines that such evidence shall not be receivable ; that if it is important to the party calling A, to establish the facts which A has heard from B, B himself shall be produced, make his own statement in Court, be subjected to the two tests of oath and Cross Examination and the scarcely less terrible detector of inaccurate or fallacious evidence, the observation to which a Judge, experienced in forensic practice, and skilled in the knowledge of human

nature, subjects the demeanour, the department, the manner, of every witness who comes before him.

§ Does the rule of Exclusion apply to all Hearsay Evidence ?

1. Hearsay is the statement of a person who is not a witness in the Court and which is sought to be tendered as evidence through another person who comes as a witness.

2. The question is, does the rule of exclusion apply to all statements of a person who is not a witness in Court.

3. To understand, this question it is necessary to realise that a statement when tendered in evidence wears two different aspects. A statement is a fact and it is also the statement of a fact.

Illus--

When A gives Evidence that B said this or that

(i) taken as a fact the question is did say so or did he Not

(ii) taken as a statement of a fact the question is is what said false or true.

4. The Evidence of a statement by a person who is not a witness may be given for two purposes :

(i) To prove that such a statement was made. (ii) To prove that a statement made is a true statement.

In its former aspect it is merely a fact in issue. In its latter aspect it is an assertion to prove the truth of the matter stated.

5. Whether a statement by a non-witness sought to be tendered in evidence and the admissibility is in question is tendered merely as a fact in issue or relevant fact and is tendered as an assertion to prove the truth of the matter, depends upon the purpose for which it is tendered. The test is the purpose.

6. The Rule of Exclusion of hearsay is stated in a narrow sense as well as in a wider sense. In its narrower sense, it is confined to unsworn statements used to prove the truth of the facts stated. In its wider sense, it is used to inched all statements by unsworn witnesses for whatever purposes tendered i. e. including statements used merely as facts.

The Rule adopted in the Evidence Act.

1. The Indian Evidence Act does not recognise the rule that " no statement as to the existence or non-existence of a fact which is being enquired into, made otherwise than by a witness whilst under examination in Court can be used as evidence "— Markby.

2. Under the Indian Evidence Act statements by nonwitnesses are admissible where the making of the statements not its accuracy is the material point.

3. Therefore

(i) Statements which are parts of the resgestee, whether as actually constituting a fact in issue or accompanying it (ss 5,8),

(ii) Statements amounting to acts of ownership, as leases, licenses and

grants (Sec. 13),

(iii) Statements which corroborate or contradict the testimony of witness (ss. 155,157,158)

are admissible even though they are statements by non-witness.

4. The rule of the exclusion of hearsay applies only to statements made by non-witnesses which are used to prove the truth of the facts stated.

4. What are the exceptions to the rule ?

1. Under the rule of evidence contained in the Evidence Act a statement made by a non-witness to prove the truth of the facts stated therein is inadmissible.

2. There are exceptions to this rule.

§ Exceptions contained in Section 32.

1. When a person is dead or cannot be found or has become incapable of giving evidence or whose attendance cannot be procured without delay or expense, statements written or verbal made by such persons may be proved if the statements fall under any one of the 8 categories mentioned in Section 32.

(i) When it relates to the cause of his death (a)

(ii) When it is made in the course of business. *Illus* (b) (j)

(iii) When it is against the pecuniary or proprietary interest of the maker or which if true would have exposed him to criminal prosecution or suit for damages. *Illus* (e) (f)

(iv) When the statement gives his opinion as to public right or custom or matters of general interest provided such opinion was given before controversy had arisen. *(Illus)* (i)

(v) When it relates to the existence of relationship by blood, marriage or adoption and the person had special knowledge and was made before controversy.

(vi) When it relates to the existence of relationship between persons deceased and is made in any will or deed relating to family affairs, in a family pedigree, upon any tombstone, family portrait etc., and is made before controversy.

(vii) When it is contained in any deed, will or other document which relates to any transactions as is mentioned in Sec. 13, clause (a).

(viii) When it is made by a number of persons expressing feelings or impressions. Illus. V.

§ Exceptions contained in Section 33.

1. When a person is dead, or cannot be found, or is incapable of giving evidence or is kept out of the way by the adverse party or if his presence cannot be obtained without unreasonable delay on expense then

the Evidence given by such a person as a witness in a former judicial proceeding or before any person authorised by law to take it,

can be tendered in a subsequent judicial proceedings or in a later stage of

the same judicial proceedings to prove the truth of the facts which it states.

PROVIDED

(i) That the proceeding was between the same parties or their representative in interest

(ii) That the adverse party in the first proceeding had the right and opportunity to cross examine

(iii) That the questions in issue were substantially the same in the first as in the second proceeding, (Further portion not forthcoming—ed.)

35 § Entries in any book, register or record

1. Conditions of admissibility.

(i) Two classes of entries are contemplated by the section, (a) By public servants and (b) by persons other than public servants. If it is by a public servant then it must be in the discharge of his official duty. If it is by persons who are not public servants then the duty to make the entry must have been specially enjoined by the law. The former is as a matter of course. The latter is as a matter of special direction.

(ii) The book, register or record must be either public or an official one.

Official does not mean maintained for the use of the office. It means maintained by the State as distinguished from anything maintained by a private individual.

Public means for the use of the public. Public does not mean open to every one. It means open to every one having a concern to it. *18 Cal. 584.*

(iii) The Book, Register or Record may be in the book, register or record kept in any country not necessarily in India, provided it satisfied the conditions. An entry in a book, register or record of any foreign country can be proved.

Points to be noted.

(1) The entry is evidence ; though the person who made it is alive and is not called as a witness—For the proof of public and official documents see Sections 76-78.

(2) The Sections does not make the book, register or record evidence to show that a particular entry has not been made— *10 Cal. 1024; 25 All. 90.*

(3) The Section is not confined to the class of cases where the public officer has to enter in a register or other book some actual fact which is known to him— *20 Cal. 940.*

(4) Although the entry must have been made by a public servant in the discharge of his official duty or in the performance of a duty specially enjoined by law, but it must not be such an entry which a public servant is not expected or permitted to make, or which from ignorance of his duties or caprice or otherwise, he may choose to make at the dictation of a person who had a personal knowledge of the truth of the facts stated in the entry. 25 *All.* 90. F.B.101.

2. It is not necessary that the entries must have been made up from day or (as in banks) from hour to hour as the transactions take place. Time when the entries are made is not essential. All that is necessary is that they must have been made regularly in the course of business. Delay in entry may affect its value but cannot affect its admissibility—-27 Cal. 118 (P.C.); 13 C. L. J. 139.

3. Although the actual entries in books of account regularly kept in the course of business are relevant, the book itself is not

relevant to disprove an alleged transaction by the absence of any entry concerning it. *10 Cal. 1024.*

NOTE : It may be admissible under Sec. 9 and 11—19 C. N. 1024.

For inference to be drawn from absence of entry. *30 Cal. 231 (247) P .C.*

4. The entry must be in some book, register or record. Entry does not include correspondence 7 *M.L.I. 11*7.

Illus—

1. Entries in Birth and Death Registers.
2. Entries in Birth and Revenue Registers.
3.. Entries in Birth and Marriage Registers.

36 § Statements of fact in issue or relevant facts made in Maps, Plans and Charts.

I Conditions of admissibility.

The section refers to two classes of Maps and Plans.

(a) Those generally offered for public sale and

(b) Maps or Plans made under the authority of Government.

Reasons for the admissibility of (a)

The publication being accessible to the whole community and open to the criticism of all the probabilities are in favour of any inaccuracies being challenged or exposed.

Reasons for the admissibility of (b)

Being made and published under the authority of Government, they must be taken to have been made by and to be the result of the study or inquiries of competent persons.

37 § Statement made in a recital in any Act or in a notification of the Government appearing in the Gazette.

Reasons.

1. The Gazettes and Acts are admissible because they are made by the authorised agents of the public in the course of an official duty and published under the authority of the State and facts stated in them are of a public nature and notoriety.

2. As the facts stated in them are of a public nature, it would often be difficult to prove them by means of sworn witnesses.

1. Relevant only if the Court has to form an opinion as the existence of any fact of a public nature.

2. Public nature, (not explained—ed.)

3. The section draws no distinction between a public and private Act of Parliament. It merely requires that the fact recited in either case should be a public nature.

4. The recitals are not conclusive so far as the Evidence Act is concerned. However they may be expressly declared to be conclusive.

5. A recital is to be proved for showing the existence of a fact. It is no evidence that the particular person knows its existence. Knowledge of a fact although it be of a public nature is not to be conclusively inferred from a notification in the Gazette; it is a question of fact for the determination of the Court. It must be shown that the party affected by notice has probably read it.

38 S.

1. Statement of the law of any country in

(a) book purporting to be printed or published under the authority of the Government of such country and to contain any such law.

2. Report of a ruling of the Court of such country contained in a book supporting to be a report of such rulings.

This applies where the Court has to form an opinion as to a law of any country.

Particular instances of facts which are inconsistent with facts in issue or relevant facts or which make them highly improbable.

They are (1) Admissions (2) Confessions and (3) Judgements.

§ Admissions

Sec. 27.

1. Admission may be proved against the person who makes them or against his representative in interest.

2. Question is what is an admission? Before that certain points regarding the relevancy of admissions must be noted.

(1) Admission can be proved against a person. Admission in favour of a person cannot be proved by him. A plaintiff can prove an admission made by the Defendant if it is necessary for this case. A defendant can prove an admission made by the plaintiff if it is necessary for his case. But a plaintiff cannot prove an admission made by him however helpful it may be for his own case. Similarly a Defendant cannot give evidence of an admission made by him however hopeful it may be for his own case.

The reason is that a party cannot be allowed to create evidence in his own favour.

There are three exceptions to this rule under which a party is permitted to give evidence of an admission in his own favour.

(a) If the Admission is relevant under Sec. 32. (b) If the Admission relates to a state of mind or body made about the time and is accompanied by conduct. (c) If the admission is relevant otherwise than as an admission.

Illus: (d)and(e)

Sec. 23.

(2) Barring these three cases , an admission, if it is to be proved can be proved only against a party. But there is a case in which proof of an admission cannot be given. This is a case where admission was made on the express condition that proof of the admission shall not be given.

Sec. 31.

(3) Admissions are not conclusive proof of the matter admitted. An admission may become an estoppel if the elements necessary for estoppel exist in which case a party against whom it is sought to be proved cannot give evidence to disprove it or explain it away. But if it is not an estoppel, evidence can be given by the party against whom it is proved to disprove it or to explain it.

3. Admissions can only be proved against the party who made them but they can also be proved against his representative- interest.

Who is a representative-in-interest ?

(i) There is no definition of the term given in the Act.

(ii) It is held to be wider than the term Legal representative which according to the penal code means a person who represents in law the estate of a deceased person.

(iii) It not only includes a ' legal representative ' but also includes the **privies of a person.**

(iv) The privies of a person are :—

(i) *Privies in blood,* such as ancestors and heirs.

(ii) *Privies in law,* such as executor of a testator or administrator to an intestate.

(iii) *Privies in estate* or interest, such as Vendor and Purchaser, grantor and grantee, donor and donee, lessor or lessee.

So that an admission :

(1) made by the father can be proved against the son ;

(1) made by the deceased against the executor or administrator ;

(2) made by the Vendor against the Purchaser.

17-20 § What is an Admission.

1. Admissions are (1) Formal or (2) Informal. (1) Formal admissions are :

(i) Admissions contained in the pleadings.

(ii) Admissions in answers to interrogatories.

(iii) Admissions on notice to admit facts.

(iv) Admissions on notice to admit documents.

(v) Admissions by Solicitors.

(vi) Admissions by Counsels.

(2) Informal Admissions are :

(i) By Statements.

(ii) By Conduct—

(1) Act or Omission.
(2) Silence.
(3) Acquiescence.

4. Admissions the proof which is allowed by section 21 do not Formal Admissions. Section 21 deals with informal admissions only. But it does not deal with all the classes of informal admissions. It does not deal with informal admissions by conduct. It only deals with informal admissions contained in statements. It deals with assertions and not acts.

5. The definition of an admission as used in Section 21 is spread over sections 17-20.

An admission is a statement, oral or documentary, which suggests an Inference as to any fact in issue or relevant fact made by a person specified in Sections 18, 19, 20.

Two things are necessary.

The statement may not be directly touching the fact in issue or a relevant fact. It is enough if it suggests an inference of acknowledging the fact in issue or relevant fact.

Illus —

A sues X for damage done by K's cattle to A's crop and for the purpose of showing an admission on the part of X that his cattle had caused the damage. X offers the testimony of B to the effect that X told that X had offered a certain sum to cover the damage.

This is a statement which can sustain the inference that X's admission that his cattle did do the damage.

IIIUS—

A sued *X* for the loss of his sheep alleging that *X'* s dog had killed them. As proof he adduced evidence that *X* had killed his dog at the time remarking that it will not kill any more sheep.

Is this an Admission ?

II. It must have been made by persons specified in Sections 18-20.

1. Deference to sections 18-20 shows that the reasons specified fall into categories.

(1) Persons who are parties to the proceedings and
(2) Persons who are not parties to the proceedings-strangers.

Persons who are parties to the proceedings include :

(1) Parties.
(2) Agents of the parties.
(3) Persons jointly interested in the subject-matter of proceedings . e. g. partners, joint contractors.
(4) Persons from whom parties have derived their interest.

I. Strangers.

Where can a statement of a person who is a stranger and is not in any way related to a party to the proceedings mentioned in Section 18, be treated as

an admission by a party.

Two cases. (1) Statement is that of a referee—Section 20.

II. When the liability or position of that stranger is subject-matter of the proceedings.

and

(2) When the statement of the stranger, be such as to amount to admission by him of his liability i. e. it must come within Section 17-18.

Illus. To the section —of liability. *Illus. 5 Mad. 239*—of position.

A and B are jointly liable for a sum of money to C who brings an action against *A* alone.

A objects that he cannot singly or severally be made liable and that *B* should be joined as a co-defendant being jointly liable.

An admission by B to *D* as to his joint liability is relevant between *A* and *C* and may be proved.

D may prove it although *B* is not called.

§ Confession

1. Evidence may be given of a confession provided it be not expressly excluded whether made to a private person or to a Magistrate.

2. That a confession was made is a fact which must be proved like any other fact.

9 *Mad. 224 (240).*

5 Lah. 140.

4 All. 46 (94).

8 W. R. Cr. 28.

3. Two Questions arise :

I. What is a Confession.

II. What are the cases in which the Evidence of a Confession is excluded.

1. What is a Confession :

1. The Act contains no definition of the term Confession.

2. The definition of the term is therefore a matter of judicial interpretation.

3. A confession is a statement. An Admission is also a statement although the one is a statement by an accused while admission may be statement by a party. Two questions arise :

(1) What is the precise difference between Confession and Admission.

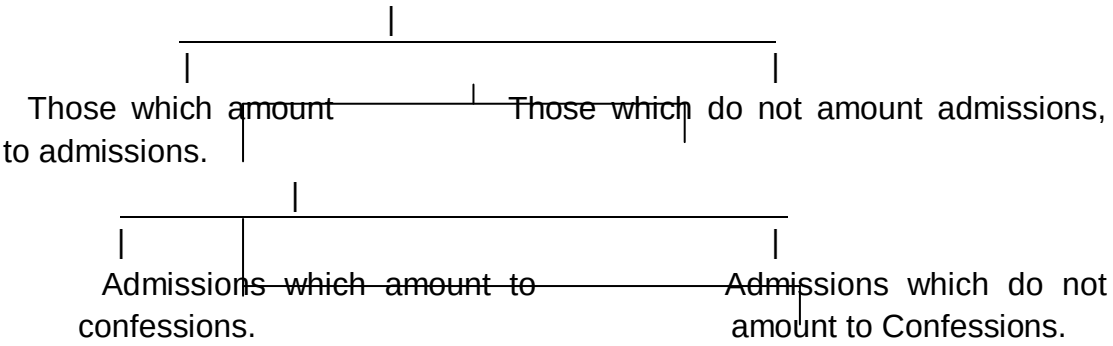
(2) When is a statement by the accused a Confession and when it is an admission.

1. Statements made by an Accused person belongs to a class which the Evidence Act calls " admissions " (sections 17,18) and. . .. .. they are evidence against the maker but not in his favour.

2. Confessions are a sub-species of " statements " and a species of admissions.

3. The following table illustrates the relationship.

Statements



4. The common feature of confessions and admissions is that they are both of them are **statements** made by the party to the proceedings.

5. Two questions arise.

1. A statement is an admission even though it is not made by the party himself. If it is made by a person defined in Sections 18-20 it will be an admission. Can a statement rank as a confession if it is made not by the Accused himself but by persons specified in Sections 18-20.

1. To be a Confession, it must be by the Accused himself. If it is not by the accused it is not a Confession :

1. An exculpatory statement by the Accused is not a Confession.

2. An inculpatory statement by the Accused which involves him but does not incriminate him is not Confession.

3. An inculpatory statement which not only involves but also incriminates is a Confession.

Points to be noted.

1. The incrimination may be direct or may be by inference. A statement which can by itself be the foundation of conviction is a confession.

2. The statement may be intended by the accused to be self-exculpatory but it may nevertheless be an admission of an incriminating circumstance in which case it will amount to a Confession. *6 Bom. 34.*

§ Two sorts of Confessions.

1. Confessions are either Judicial or Extra Judicial.

(i) Judicial Confessions are those which are made before a Magistrate or in Court in the due course of legal Proceedings. (ii) Extra Judicial Confessions are those which are made by the party elsewhere than before a Magistrate or in Court.

§ What are the cases in which Evidence of Confession excluded

1. The Evidence Act has considered three possible cases : (i) Confession is made to a Police Officer. (ii) Confession is made while in the custody of the Police. (iii) Confession which is made to a person who is not a Police Officer and which is not made while in the custody of the Police.

With regard to (i)

It is excluded by Section 25. With regard to (ii)

It is excluded by Section 25, 26. Exception.

Effect of Sec. 27.

6All. 509(F.B.)

Question. Is Section 27 an exception only to Section 26 and not to section 25 ?

or

Is it an exception to both ?

57Cal. 1062.

With regard to (iii)

The matter is governed by Section 24. **Explanation.**

1. Person in authority.

2. Appears.

Points to note:

1. Sec. 28 Confession after..... ..... is removed.
2. Sec. 29

Queries.

1. Does Sec. 24 apply to statements made by the Accused under Sec. 287 Cr. P. C. before the Committing Magistrate.

Q. Not settled. *17 Bom. L.R. 1059.*

II. Does Sec. 24 apply to statement of an Approver under pardon under Sec. 339 (2) Cr. P. C. (22 *Bom. L. R. 1247).*

§ Use of Confessions.

1. Statement made by an Accused person binds him only so because of two reasons.

(i) The general rule of law is that an Admission made by one person could prejudicially affect another person.

(ii) The statement made by an accused person is not on oath.

(iii) The statement is not subject to cross-Examination.

2. But if the statement is a Confession which affects both himself and another person, then Section 30 says the Court may take into consideration the confession made by the Accused against other persons mentioned in the Confession.

3. Section 30 is therefore an exception to the general rule. The reason for this exception is the fact of self- implication which is said to take the place as it were of the sanction of an oath or is rather supposed to serve as same guarantee for the truth of the accusation against the other.

4. With regard to the use of the confession of one Accused against another accused, the important words are " **Court may take into consideration** ". This means,

(1) That the use is not obligatory. It is permissive and discretionary. Court is permitted to use it. Court is not bound to use it.

(2) Court may Consider it. The word consider is significant.

(1)A statement made by a witness is " evidence ", according to the

definition of that term. A confession by an accused person affecting himself and his co-accused is not " evidence " in that special sense. It is in the sense that it is a matter before the Court which it may consider. The question is while allowing it to be so considered, does it do away with the necessity of other evidence ? There is no direct answer given in the Evidence Act. But all the Courts have held that it does not do away with the necessity of other evidence. The reasons are:

(1) Confession is never a complete guarantee of its truth against the other persons whom it involves. A confession may be true so far as it implicates the maker but may be false and concocted through malice and revenge so far as it affects others.

(2) Confession cannot be placed above the testimony of an accomplice because the latter is subject to Cross Examination while the former is not and if testimony of an accomplice requires corroboration a confession must.

Conclusion. If there is (a) absolutely no other evidence in the case, or (b) the other evidence is inadmissible such a Confession alone will not sustain a Conviction. There must be corroboration.

When persons are accused of an offence of the same definition, arising out of a single transaction, the Confession of one may be used against the other, though it inculcates himself through acts separable from those ascribed, to his accomplice, and capable, therefore of constituting a separate offence from that of the accomplice.

8 Bom. 223.:7 Mad. 579 Abatement—Same offence

1. Importance of the words made and proved. Does the section include statement made by one accused at the trial which incriminates himself and implicates a co-accused ?

The answer is that it does not.

The Section is not to be read as though the words **"at the trial** " were inserted after "made " and the word " recorded " substituted for " proved ". *(1890) 14 Mo. Jur. N. S. 516.*

The Section does not refer to the statements made at the trial. It refers to statements **made before** and proved at the trial. The use of the term proving a Confession is inapplicable to the procedure where the Judge asks questions and the accused gives explanation. *45 All. 323.*

2. Importance of **"Jointly tried** ".

In this connection two important questions arise—When one Accused confesses and in his confession implicates a co-accused and pleads guilty.

(i) In such a case can he be treated as being jointly tried with the rest, as to let in his confession under this section against co-accused ?

(2) In such a case can an Accused who pleads quilty be called as a witness against those who do not plead guilty ?

Q. 1. His Evidence cannot be taken into consideration because he ceases

to be jointly tried. 5 *Bom. 63; 7 Mad. 102; 19 Bom. 195.*

Although it is open to the court to continue the trial without convicting the Accused who pleaded guilty, yet it is unfair to defer convicting them merely in order that their confessions may be considered against the other accused. *23 All. 53.*

Q. II. This depends upon the definition of the word accused : When does an accused person cease to be an accused person ?

Until an Accused person who has pleaded guilty is convicted or acquitted, he is still an accused person and is therefore not a competent witness against the co-accused. *13 C. W. N. 552.* Until an Accused person who has pleaded guilty is convicted and **sentenced,** he is still an Accused person and is therefore not a competent witness against the coaccused. *3 Bom. L. R.*

Summary.

1. When a person pleads guilty—he ceases to be jointly tried but he does not cease to be accused person. So that on plea of guilty his confession cannot be taken into consideration against other accused because they are not co-accused jointly tried : nor can he be called as a witness because he continues to be an accused until sentenced.

2. When a person pleads guilty and he is jointly tried and ceases to be an accused person, his Confession cannot be used but he becomes a competent witness.

Relevancy of Judgements. *Sec. 40*

Where the question is whether a Court ought to take cognisance of a suit or to hold such trial.

The existence of a judgement order or decree which **prevents** any Court from taking cognisance of a suit or holding a trial is relevant fact.

Comment.

1. The law by which a prior judgement order or decree prevents a civil court from taking cognisance of a suit is contained in the Civil Procedure Code and the law by which a prior judgement prevents a criminal Court from holding a trial, is contained in the Cr. P. C.

2. The relevant Sections of the C. P. C.are 11-14. Provisions summarised in Field p. 260.

3. The relevant Section of Cr. P. C. is section 434.

4. Under Section 40 a Judgement is relevant if its effect is to conclude the court.

5. Such a judgement must be just between the **same** parties and on the same issues.

6. A Judgement *inter panes* does not bind a stranger. The principle underlying the rule is that no man ought to be bound by proceedings to which he was a stranger and over which he had no control.

Exception to the Rule

(I) Sec. *41*. enacts an exception to the rule, under it. A final Judgement of a

competent court in the exercise of

(i) Probate |
(ii) Matrimonial | Jurisdiction
(iii)Admirality |
(iv) Insolvency.

which confers or takes away a legal character or which declares any person to be entitled to any specific thing is admissible.

Comment:

1. This means that a judgement infer parties is admissible in a proceedings between persons who were not parties to that proceedings.

2. This section deals with what are called judgements *in rem* without using that expression. All judgements are *inter panes.* But some *inter partes* judgements are judgements *inper-sonam* and some are judgements in *rem.* Both are *inter partes.* Instead of defining judgements *in rem*—the section enumerates them.

3. The result is that every judgement which gives or takes away a character is not admissible. It is only judgements given in the exercise of particular kind of jurisdiction which is admissible.

Illus. Adoption is not admissible as between strangers.

It is a Judgement which confers a statics. But it is not admissible because it is not under any of the jurisdiction mentioned.

(II) **Exception.** *Sec .42.*

Judgement in *personam* is relevant as between strangers if the judgement relates to a subjects of a public nature.

Subjects of a public nature.

(1) Customs.
(2) Prescriptions.
(3) Tolls.
(4) Boundaries.
(5) Rights of Ferry.
(6) Sea Walls etc.

(Ill) **Exception Sec. 43.** Under this section Judgements *in personam* are admissible as between strangers under two circumstances

(i) Where the existence of such judgement is a fact in issue. (ii) Where the Judgement is relevant under some other provision of the Evidence Act.

Comment:

1. The first circumstance is easy to conceive.

Illus.

(1) A sued B for slander in saying that he had been convicted of forgery. *B* justified it upon the ground that it was true.

The conviction of A forgery would be a fact in issue and a judgement supporting his conviction would be admissible also. *B* was not a party to that judgement.

(2) A Judgement against a surety obtained by the creditor will be admissible in a suit by the surety against the principal debtor although the principal debtor was not a party to it.

(3) Upon a trial for intentionally giving false Evidence in a Judicial proceedings the record will be evidence that there was a Judicial proceedings.

2. It is the second circumstance which has created difficulty. What are the sections under which a judgement is likely to be relevant ?

Under sec. 7—Show cause, occasion. Under sec. 8—Motive conduct. Under sec. 9—Facts necessary to explain relevant facts. Under sec. 11—Facts inconsistent. Under sec. 13—Transaction.

3. Two Questions.

I. Is a Judgement a fact.

II. Is a Judgement a transaction.

6. Cal. 171 F. B.

4. Comment on 6 Cal. 171. that it is a fact. p. 181.

Fact: (1) Anything state of things, or relation of things capable of being perceived by the senses.

(2) Any mental condition of which any person is conscious.

II Documentary Evidence.

1. The subject to be dealt with is the proof of the statements made in a document i. e. proof of the contents of a document. Oral Evidence deals with the proof of the statements made verbally by a party.

2. What are the requirements of the Rule of Best Evidence with regard to the proof of the contents of a Document ? There

are two requirements'—

(i) In certain cases the Evidence must be documentary and not oral.

(ii) In those cases where the Evidence must be documentary that evidence must be primary.

§ Cases where Evidence must be documentary

1. Many matters are reduced to writing. But because they are reduced to writing, the Law does not require that every such case they shall *be proved only* by the production of the document. Some may be proved by oral Evidence and others must be proved by documentary Evidence.

2. For this purpose it is necessary to note that the Indian Evidence Act makes two distinctions—

(1) between documents which are **dispositive** in character and documents which are non-dispositive in character and

(2) between transactions which are required by law to be in writing and those which are not.

3. Dispositive and non-dispositive. Dispositive means transactions in which parties dispose of their rights, such as a Contract, grant etc., Non-dispositive means transactions in which no disposition of rights is involved.

4. The rule embodied in the Evidence Act is twofold :

(i) When a document is a dispositive document and when the matter is such that the law requires it to be reduced to writing no evidence shall be given in proof of the matter except the document. In other words oral Evidence in such cases cannot be substituted for documentary Evidence. But if the document is of a non-dispositive character or if it is one which is not required by law to be reduced to writing then although the transaction may have been reduced to writing yet oral evidence may be given in proof of the transaction.

(ii) If the transaction is a dispositive transaction or is one which is required by law to be in writing then not only oral Evidence cannot be substituted for the documentary Evidence but oral evidence cannot be admitted to contradict, modify or vary the terms of the document.

5. This rule is contained in Sections 91-92.

§ Exceptions to the Rule contained in Secs. 91-92.

1. There are exceptions to this rule. They fall into classes. They must be kept separate. One class deals with cases where the question is whether oral evidence may be substituted for documentary Evidence. The second deals with cases where the question is whether oral evidence may be admitted not to substitute but to modify documentary evidence where the rule requires that the Evidence shall be documentary.

§ Exceptions which permit substitution of oral Evidence for documentary Evidence.

1. They are contained in Section 91 and cover the following cases:

(i) Appointment of a Public Officer. (ii) Will may be proved by the probate.

§ Exceptions which permit oral Evidence to be given to modify the terms of the document.

1. They are contained in Sec. 92 and cover the following cases.

2. The first thing to note is that such evidence can always be given by persons who were not parties to the document or who are not representatives in interest of the parties to the document.

3. The cases in which parties to the document or their representatives in interest can give oral Evidence are as follows :— (i) Fact which would invalidate a document e. g. fraud, want of capacity.

(ii) Fact on which document is silent and which is not inconsistent with its terms. (iii) Condition precedent. (iv) Subsequent oral agreement. (v) Usage or custom by which incidents are attached to contracts. (Bakers dozen). Provided it is not inconsistent. (vi) Fact showing how the language is related to existing facts.

§ Cases where oral Evidence may be admitted to Explain documentary

Evidence.

There are two propositions of law which arise out of the first rule of Best Evidence relating to Documentary Evidence.

1: Where the transaction embodied in a document is of a nondispositive character or is one not required by law to be in writing the fact of the transaction may be proved by oral Evidence.

2. Where it is dispositive or required by Law to be in writing then oral evidence not only given to prove the transaction but it cannot be given to contradict, modify or amend the terms of the transaction as embodied in the document.

3. One question however remains. Can oral Evidence be given to explain documentary Evidence ? This is a distinct question and must be separated from the question whether evidence can be given to modify contract etc. the terms of the documentary evidence.

4. This question is dealt with in Sections 93-100.

5. In dealing with documentary Evidence disputes may arise on three counts:

(i) Disputes regarding applicability or non-applicability of the language of the document to existing facts.

(ii) Disputes regarding the meaning of the documents where the language used is ambiguous or defective.

(iii) Disputes regarding the meaning of the words used in the document.

1. Under I there are three possible cases of disputes.

(1) Where language applies accurately to facts and the contention is that it was not meant to apply— Evidence may not be given in support of the contention to show that it was not meant to apply to the existing facts to which they do apply—Sec. 94.

(2) Where language applies to one of the existing facts but not to all of them— and the contention is that it applies to one specified fact— Evidence may be given in support of the contention to show to which particular fact it was intended to apply.—Sec. 95.

(3) Where language applies partly to one set of facts and partly to another set of facts and whole does not apply correctly to either and the contention is that it applies to one set and not to the other—Evidence may be given in support of the contention to show to which of the two it was meant to apply—Sec. 97.

1. Under the second Head of Disputes there are two possible cases:

(i) Where language is ambiguous or defective and the contention is that the parties meant a particular thing— Evidence may not be given in support of the contention to show its meaning or to supply its defects— Sec. 93.

(ii) Where the language is plain in itself but is unmeaning in reference to existing facts and the contention is that it was meant to indicate a particular thing—Evidence may be given in support of the contention to show what

was meant —Sec. 95.

. Under the third head of disputes there arises the following case— (i) ... (Space left blank in M.S.—ed.)

Difference between latent ambiguity and patent Ambiguity. II How to prove the contents of a Document ?

1. What are the requirements of the Rule of Best Evidence with regard to the proof of the Contents of a Document ?

2. There are two requirements in this respect as laid down in the Evidence Act.

(i) The contents of a document must be proved by Primary Evidence.

(iii) The document must be proved to be genuine.

§ What is meant by Primary Evidence ?

Sec. 62.

(1) Primary Evidence means the document itself produced for the inspection of the Court.

Explanation (Space left blank in M. S.—ed.)

§ How to prove that the document is genuine ?

1. For the purpose of proving their genuineness the Evidence divides documents into two classes (1) Public Documents and (2) Private Documents.

2. Public Document is defined in Sec. 74.

3. Section 75 declares that any document which is not a public document is a private document.

4. The rules for proving the genuineness of a document differs according as the document is a public document or a private document.

5. The mode of proving the genuineness of a public document is stated in Sections 76-78.

6. The mode of proving the genuineness of a private document is stated in Sections 67-75.

7. Private documents must generally be proved by the production of the original coupled with the evidence of the **handwriting, signature or execution** as the case may be. **Exception**— will may be proved by probate.

8. The genuineness of public documents may be proved either by the production of certified copies under Section 77 or if they be documents of the kind mentioned in Section 78 the various modes prescribed in that section.

9. With regard to the burden of the genuineness of a document whether it is public or private, the Evidence Act enacts certain presumptions which are contained in Sections 79-90 although they are not conclusive presumptions.

10. These presumptions fall into classes :

(1) Those in which the Court shall presume. 79-85 and 89.

(2) Those in which the Court may presume. 86-88 and 90.

§ When is Primary Evidence dispensed with ?

(Space left blank in M. S.—ed.)

§ How are the Contents of a document proved where Primary Evidence is dispensed with ?

1. By Secondary Evidence.

(Space left blank in M.S.—ed.)

§ What is Secondary Evidence ?

(Space left blank in M. S.—ed.)

BURDEN OF PROOF

1. The law requires the person on whom the burden of evidence is placed to discharge the burden.

2. In discharging this Burden of Proof the following considerations must be borne in mind :—

(i) There are matters of which Proof is not required. (ii) There are matters of which Proof is not allowed.

3. Under (i) his burden is lightened while under (ii) his burden is increased.

BURDEN OF PROOF

(i) Matters of which Proof is not required by Law

1. Matters of which Proof is *not* required by Law fall under three heads:

(a) Matters which are judicially noticed. (b) Matters which are admitted by parties. (c) Matters the existence of which is presumed by Law.

§ Matters which are judicially noticed

1. Sections 56 and 57 deal with facts which are judicially noticed. Section 57 enumerates 13 matters of which judicial notice must be taken.

Section 56 says that no fact of which the Court will take judicial notice need be proved by evidence. Parties are relieved from the burden of adducing evidence to prove a fact which falls under any one of the matters falling under Section 57 of which judicial notice must be taken.

2. *The principle underlying the Sections.*— Certain matters are so notorious and are so clearly established that it would be useless to insist that they should be proved by evidence.

Illus.

1. The commencement and continuance of hostilities.
2. The Geographical Divisions of the Country.

These facts are so notorious that proof of them by evidence is superfluous.

2. Matters enumerated in Section 57.

(i) RULES HAVING THE FORCE OF LAW.

Many Acts contain a Section empowering the Local Government to make rules for carrying into effect the provisions of the Act and declaring that such rules shall have the force of Law e. g. Rules made under the Government of India Act. Such rules fall within the purview of this section.

2. Distinction must be drawn between rule having the force of law and

custom which is the source of Law. A large part of Hindu Law is based on custom. But the Court will not take judicial notice of a custom. The party who relies on a custom must prove the existence of the custom. When the party has proved the existence of the custom the Court will give effect to it only if it comes to the conclusion that it is a valid custom.

3. It is true that there are some customs for the proof of which the Court does not require Evidence. But that is not because the Court is bound to take judicial notice. The Court does not require formal proof because by the rule of precedent, the Court is bound to uphold a custom, the existence and validity of which has been recognised in an earlier decision by a Court to which it is Subordinate.

(ii) STATUTES. The statutes passed by Parliament are either general or special.

A General Statute is universal in its application and extends to all persons and to all territories.

A Special Statute is either local or personal and operates upon particular persons and private concerns.

2. All Acts of Parliament are to be presumed to be public unless the contrary be declared therein - Section 13 of 14 Vict. c. 21.

3. Judicial notice *must* be taken of all public Acts. Court is not bound to take judicial notice of a Private Act unless the particular Private Act contains a direction to the Court to take judicial notice. If it does not contain such a direction, the party must prove that a Private Act relied upon is an Act of Parliament.

(iii) INDIAN ARTICLES OF WAR.

These are rules of discipline for Native Officers, soldiers and other persons in His Majesty ' s Indian Army. They are contained in the Indian Army Act of 1911.

(iv) COURSE OF PROCEEDINGS OF PARLIAMENT AND COUNCIL.

1. Course of Proceedings must be distinguished from proceedings themselves.

2. The Court will take judicial notice of the course of proceedings and not of the proceedings.

Foreign State

Court will take judicial notice whether a foreign State is recognised or not by His Majesty or by the Governor-General in Council.

State of War

The existence of a State of War between foreign States will not be taken judicial notice of.

Rules of the Road on Land or Sea

Effect of the last para.

1. Court can refuse to take judicial notice under certain circumstances of matters of which they are bound to take judicial notice.

2. Party is bound to produce the necessary material to enable the Court to take judicial notice.

Illus.

Gazette must be produced if the party wishes the Court to take judicial notice of a Proclamation.

Mode of Proof

1. The general rule regarding mode of proof may be stated thus:

The law requires evidence to be given by a person— (i) Who is present in the Court. (ii) Who is legally competent as a witness. (iii) Upon oath or affirmation. (iv) In regular course of Examination. (v) Subject to contradiction as to facts. (vi) Subject to discredit as to veracity.

1. PRESENCE IN COURT.

1. It is a duty of the citizens to appear and testify to such facts within their knowledge as may be necessary to the due administration of justice. It is a duty which has been recognised and enforced by the Common Law from an early period.

2. The right to compel the attendance of witnesses was incidental to the jurisdiction of the Common Law Court, and the statutes have conferred this power upon other officers such as Arbitrators. Every Court having power definitely to hear and determine any suit, has by the Common Law, inherent power to call for all adequate proof of the facts in controversy and to that end, to summon and compel the attendance of witnesses before it.

3. The wilful neglect to attend and to testify after proper and reasonable service of the *subpoena* and in civil cases, after payment or tender of the witnesses fee of waiver of payment is a contempt of Court.

4. The process to compel attendance of witnesses to give testimony or to produce documents is not provided for in the Evidence Act. It is provided for in the Civil and Criminal Procedure Codes.

1. The following matters are in the Country provided for by the Civil and Criminal Procedure Codes.

(i) Summoning of witnesses :

Civil Pro. C.	0. XII
Cr. Proc. C.	68-74 (Summons)
	90-93 (Other rules regarding Process)
	328 (Summons on Juror or Assessor)
	244 (Issue of Process in Summons Cases)
	254 (,, ,, Warrant cases)
	256 ( )
	257 ( )
	540 (Power to summons material witness on Examine person present)

(iii) Production of documents and other things:

Civil P. C. 0. XI, XVI.

Cr. P. C. 94,95 (Summons to produce documents or other thing)
96-99 (Search warrants)
485 (Consequences of refusal to produce)

(iii) Expenses of the witnesses :

Civil P. C. 0. XVI. R. 2-4

Cr. P. C. 244, 257.

(iv) The freedom of complainants and witnesses in criminal cases from police restraints.

Cr. P. C. 171.

(v) Recognisance for the attendance of complainants and witnesses in Criminal proceedings.

Cr. P. C. 217, 170.

NOTE.— Not provided for in Civil cases.

(vi) Exemption of witnesses from arrest under Civil process. Civil Pro. Code S. 135.

NOTE.—There is no protection given against Criminal process.

6. Not only is there provision for summoning a witness, there are provisions for compelling his attendance.

(1) Non-attendance in obedience to a Summons is made an offence by Section 174, 175,1. P. C.

(2) Non-attendance in obedience to a summons may be followed by *Warrant of arrests* under Sections 75-86 and by Proclamation and Attachment under Sections 87-89 of the Cr. P. C.

(3)Non-attendance may further render a witness liable to a Civil action for damages under Section 26 of Act XIX of 1853 (in force in Bengal) and under Section 10 of Act X of 1855 (in force in Bombay and Madras).

24W.R.72.

7. Although the law requires persons summoned as witnesses *to attend inperson,* the law also excuses non-attendance in certain cases.

(i) By reason of non-residence within certain limits.

Civil P. C. 0. XVI R. 19. (ii) By reason of the witness being a *purdanashin* lady.

Civil P. C. Section 132.

(iii) By reason of the witness being a person of Rank. Civil P. C. Section 133.

§ The witness must be competent to give evidence

1. The question of competency of a person may be considered from two points of view.

(1) From the point of view of his intellectual capacity.

(2) From the standpoint of his veracity.

1. COMPETENCY FROM THE STANDPOINT OF INTELLECTUAL CAPACITY.

1. Section 118 deals with the question of competency from the standpoint of intellectual capacity.

2. The rule enacted in Section 118 is a rule which recognises the power of understanding as the *only* test of competency.

3. As every normal person has the intellectual capacity to understand things and to grasp their importance. Section 118 declares *that all persons* are competent to testify unless they suffer from want of understanding.

4. The law of competency is therefore practically the law of incompetency. A person is a competent witness who is not incompetent.

5. Incompetency therefore means want of understanding. This want of understanding may arise from

(i) Tender years.
(ii) Extreme old age.
(iii) Disease whether of body or mind.
(iv) Any other cause of the same kind.

6. *Comment.* (i) *Tender year or* (ii) *Extreme old age*— is not defined.

A boy of 7 may not be incompetent but 12 may be, if the former has an understanding which the latter has not. A man of 60 may be incompetent and a man of 80 may not be.

The test is not the age. The test is the Existence or non-Existence of understanding.

(iii) *Disease of the body*

A witness may be in such extreme pain as to be unable to understand or if able to understand to answer questions. He may be unconscious, as if in a fainting fit, catalepsy or the like. Here again it is a question of fact whether in any particular case the disease of the body is such as to deprive a person of his power of understanding.

(iii) *Disease of the mind*

1. This contemplates the case of an idiot and a lunatic, both suffer from the disease of the mind.

2. An idiot is one who is born irrational, without the reasoning faculty. A lunatic is one who is born rational, has subsequently become irrational and lost his reasoning faculty.

3. A lunatic is either a *monomaniac* or is a maniac for the time being. That being so, a lunatic is not incompetent merely because he is a lunatic. Lunacy does not mean complete annihilation of understanding. If it is general lunacy, he may be lucid at intervals. If he is a monomaniac, his understanding about other matters may be clear.

Illus. of partial lunacy.

(1) Murder discussion in Lunatic Asylum.

(2) Interview by a person with his lunatic friend in the asylum and his remark about time.

Illus. of Monomaniac,

(1) R. V. Hill—Hill was tried for murder. Donelly witness— lunatic—suffered from the delusion that he had 20000 spirits about him which were continually talking to him.

That being so a lunatic can be a competent witness. This is recognised in the Explanation. (iv) *Any other cause.*

This means any other cause depriving a person of his power of understanding, e. g. *drunkenness.*

Some of these disabilities are coextensive with the cause, therefore, when the cause is removed the witness becomes competent.

e.g. When pain ceases
drunkenness ceases
Lunacy ceases

Whether there is understanding or not in the witness, is a matter which is determined by the Court by questioning the witness.

§ Accused as a witness

1. While all persons who have understanding are competent as witnesses, there is one exception to the rule. That is, an accused person cannot be examined as a witness in a criminal case in which he is being tried.

There is a case of the disease of the body which does not affect the mind of the understanding. Dumbness is such a disease.

Section 119 deals with the case of such a witness. The Section does not declare him to be incompetent. On the other hand, it treats him as a competent, and permits him to give evidence in any manner by *writing* or by *signs* made in open Court.

§ Competency from the standpoint of the veracity of the witness

1. The motives, which prevent a person from telling the truth, are more numerous in judicial proceedings than in ordinary affairs of life because of the fact that, result of a judicial proceeding cannot be flouted and are binding in a more absolute manner than other informal proceedings of a Panch are. Consequently the law at one time rendered many people intellectually competent incompetent to give evidence in a cause.

2. Formerly, therefore, not only mental incapacity was a good ground for incompetency but *interest* was also a ground for incompetency. Reason was that, an interested person would not tell the truth. Consequently, at one time, the following persons were deemed incompetent.

1. Parties to the suit.
2. Husband and wife against each other.
3. Accused against himself.
4. An Accomplice.

3. This view of the law is now changed and the principle has undergone a change. Question of competency or incompetency has been converted into a

question of credibility or incredibility. So that every son is rendered competent to give evidence but it is left to the Court to believe him or disbelieve him.

4. This new principle is embodied in Sections 120 and 133.

§ Section 120

I. CIVIL PROCEEDINGS (i) The parties to the suit are competent witnesses.

(ii) The husband and wife of any party to the suit are competent witnesses.

II. CRIMINAL PROCEEDINGS

1. The husband or wife of the accused is a competent witness either for or against.

§ Section 133

1. This section deals with the competency of an accomplice. The evidence of an Accomplice is held untrustworthy for three reasons:

(i) because an accomplice is likely to swear falsely in order to shift the guilt from himself.

(ii) because an accomplice as participator in crime, and an immoral person, is likely to disregard the sanction of the oath.

(iii) because he gives his evidence under a promise or hope of not being prosecuted, if he discloses all he knows against his participators in the crime.

2. But his evidence has to be admitted from necessity, it being often impossible without having recourse to such evidence to bring the principal offenders to justice.

§ Difference between the value of Evidence of Accomplices and other persons

1. Persons other than accomplices are not only competent but are also credible. An Accomplice on the other hand is only competent but is not credible.

2. Witnesses may be incredible in the eye of the Judge. But they are not incredible in the eye of the law. An Accomplice has a statutory incredibility attached to him by the law.

3. This statutory incredibility arises from illustration (b) to Section 114 of the Evidence Act. The presumption is sanctioned by the Act and although it is rebuttable, it would be an error of law not to disregard.

4. For attaching this statutory incredibility, it would be necessary to determine whether the witness is an Accomplice. The term is not defined.

(i) An Accomplice is a person who is concerned with another or others in the commission of a crime. He is a participant. But it is not every participation in a crime which makes an accomplice. Much depends on the nature of the offence and the extent of the complicity of the witness in it. 5 *W. R. Cr. 59.*

(iii) An Accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act, that he can

be justly indicted with the Accused who is being tried. *27 Mad. 271.*

§ Effect of Sections 120 and 133

1. The sections enumerate certain persons as being competent to give evidence. Question is, Are other persons not competent ? The sections are not to be understood to mean that these are the only persons who are competent and others are not. The effect of the sections is that all persons are competent including those mentioned in Sections 120 and 133.

2. The reason why it was necessary to specifically deal with these classes is, because under the earlier law they were incompetent. The ban against them had to be lifted and therefore the specific provisions relating to them. Other classes of persons were already deemed to be competent and it was unnecessary therefore to say anything about them.

3. The Effect of Sections 120 and 133 is this, that not only

(1) Parties to suits.

(2) Husbands and wives.

(3) Accomplices.

are competent witnesses, but

(1) Jurors and Assessors—Section 294 Cr. P. C.

(2) The Executor of a Will

(3) An Advocate for a party may be competent witnesses in the case to which they are a party, although it is a cause in which they are interested.

Evidence must be given on Oath

1. Oath is not a requirement of the Indian Evidence Act. Left to the Indian Evidence Act, evidence by a witness would be legal evidence although the witness had given evidence without taking oath.

2. Oath is a requirement of the Indian Oaths Act X of 1873. Section 5 of the Oaths Act lays down.

1. That oaths or affirmation *shall* be made by the following persons.

(a) all witnesses. (b) interpreters. (c) Jurors.

3. Section 6—permits a person who objects to the oath to affirm.

4. Section 14.—Every person giving evidence before any Court or person authorised to administer oaths or affirmation shall be bound to state the truth on such subject.

5. There are three questions that arise for consideration.

(1) Can a Court decline to administer oath or affirmation to a witness?

(2) Can a party decline to take oath or make affirmation?

(3) Effect of the refusal of a witness to take oath or affirm and of the failure of the Court to administer oath.

Answer to Question 1. It is a statutory duty of the Court to administer oath.

There is one qualification, namely, Court is bound to administer it to a person who is competent and not bound to administer it to one who is

incompetent, e. *g.* a child.

6 Pat. L. J. 147.

Answer to Question 2. The answer is given in Section 12. Party shall not be compelled to make it. But the Court is to make a record of his refusal and the reasons, if any, given by him.

Answer to Question 3.

Part I— Effect of the refusal of the party to take oath or make an affirmation	1. ..... 2. Such refusal only affects the value of the evidence.
Part II—Effect of the failure Judge to give oath.	1. The evidence remains of the admissible. 2. Obligation to tell the truth remains.

6. The Provisions of the Oaths Act in India are not so strict as they are in England.

(1) Oath is not a necessary condition precedent for the obligation of telling the truth. It is necessary merely to remind a witness of its sanction.

(2) The Indian Act condones the failure to remind or failure to take oath. The English law makes the evidence inadmissible.

IV. COURSE OF EXAMINATION

1. There are two possible ways in which a witness can depose (i) By narrating the facts. (ii) By answering questions put to him.

2. The Evidence Act provides that the testimony of a witness shall be taken in the form of Examination, not in the form of a narration. The reasons why the law prefers examination as the mode of giving evidence are to be traced to the rules of relevancy. A person is permitted to give evidence of matters which are relevant. He is not permitted to give evidence of all matters relating to the issue. Matters which are related to the issue are not necessarily relevant to the issue and under the Evidence Act it is the duty of the Judge to decide whether any particular fact is relevant or irrelevant and to rule out the irrelevant then and there.

If a witness is permitted to give his testimony in the form of a narration two things will happen :—

(i) The witness will in all probability tell *all* tacts relevant as well as related and this introduce irrelevant matter and

(ii) The action that a Judge may be able to take to rule out irrelevant matters will be *ex-post facto.*

On the other hand if the witness was required to give his testimony in the form of answers to questions, two objects will be achieved:—

(i) his testimony could be made to confine to relevant matters only not being permitted to wander and

(ii) the Court can immediately check and rule out the introduction of

irrelevant testimony.

4. With regard to the examination of witnesses, there are two questions which are distinct and which are regulated by different law. The *order* in which parties are to produce their witnesses for examination, and the *course* of Examination to which each witness is to be subjected when he is produced before the Court, are two separate questions.

Sections 135,138

The order in which witnesses are to be produced by the parties is a matter which is regulated by the Civil and Criminal Procedure Codes. While the course of examination to which a witness is to be subjected, when produced, is laid down by the Evidence Act.

§ Order of Production of Witnesses

1. *In Civil cases*

Order XVIII Rule 1.

In Criminal cases

Summons cases 224 Cr. P. C.

Warrant cases 252
254
257

Summary cases 262.

Rule seems to be this.

1. The first question to be determined is who has the right to begin.

2. The right to begin depends upon on whom is the burden of proof.

§ Course of Examination

1. The Course of examination of a witness prescribed by the Evidence Act is to consist of *3* parts.

Section 138

(i) Examination in chief. (ii) Cross Examination. (iii) Re-Examination.

2. Examination in chief is the Examination of the witness by the party who calls him.

Section 137

Cross Examination is the examination of the witness by the adverse party.

Re-Examination is the examination of the witness by the party who called him subsequent to his cross examination by the adverse party.

Questions to be considered

3. Examination in chief is a matter of choice. No one can compel a party to call witnesses. But if witnesses are called and examined in chief, then the question that arises is this:— Is Cross-Examination and Re-Examination a matter of *right* or a matter of *privilege,* which may be granted or withheld according to the discretion of the Court ?

The answer to this question is that Cross-Examination and Re-examination are matters of right and not of privilege. The Court cannot stop a party from Cross-examining or Re-examining a witness who has been examined in chief by the party. What about a witness who is *called by the Court* and not by any

party to the proceedings ? Is there any right to cross examine such a witness ? If so which party ? The Evidence Act makes no provision for such a case. It has however been held that a witness summoned and examined by the Court *cannot* as of right be Cross-Examined by either party without the permission of the Judge.

(1894) 2 Q.B. 316,
3 B. L. R. 145
11 W. R.I 10
24 CaL 288
5 Cal. 614
16 W. R. 257.

4. When can the right to Cross examine be exercised ?

As to this, there is a difference between civil cases and criminal cases.

(i) In *Civil Cases,* the right must be exercised immediately. It cannot be postponed to a future date.

(ii) In Criminal Cases, in a summons case before the Magistrate and in the Sessions case the right must be exercised immediately. But in a warrant case, the accused has a right to postpone the Cross-examination of the prosecution witness to the next date of hearing.

The case of a person who is called as a witness by both the parties : In a litigation between A and B, C is cited as a witness by both A and B. First he is called as a witness by A on his behalf. After his cross-examination by B and Re-Examination by A, he is called as a witness by B on his behalf.

Can B Cross-examine C ?

There is no specific provision answering this question in the law of evidence. It is a question of judicial opinion. On this question there is a divergence of view.

(1) One view is that, when a person once gets a right to Cross-examine a witness, that right continues to him at all subsequent stages of the case against that witness, no matter in what role the witness reappears, so that, even if he comes as his own witness he can Cross-examine him. This view is based on the theory that every witness is favourably disposed towards the party calling him.

(2) The other view is that, each party should alternatively have the right of X Examining such a witness as to his adversary's case, while both should be precluded in the course of the respective Examinations-in-Chief from leading questions with regard to their own case. So that a Plaintiff may Cross-Examine any of his own witnesses, on hearing afterwards called on behalf of the Defendant.

The better opinion is that the right to X Examine does not survive and he cannot be asked leading questions on his Second Examination. If the adversary again called the same witness who has been examined by the

other side and Cross-examined by him, he could clearly examine him in-chief.

This rule appears to have been adopted by the Evidence Act.

5. Does this prescribed course of Examination apply to every witness ?

1. There are three sorts of witnesses who are called before the Court:

(i) Those who are called to depose to relevant facts.

(ii) Those who are called to speak to character.

(iii) Those who are called to produce documents.

2. With regard to witnesses who are called to depose to relevant facts or to speak to character, they are subject to the full prescribed course of examination. Cross-examination and Re-examination. But the witness, who is called to produce documents, stands on a different footing. He is not a witness and therefore cannot be cross-examined.

6. Can one Co-accused Cross-examine a witness called by another co-accused ? Can one Co-defendant Cross-examine another co-defendant or the witness called by a co-defendant ?

(1) The Section does not make special provision for the case of Cross-examination by co-accused and co-defendants.

(2) The Evidence Act gives a right to Cross-examine witnesses called *by the adverse* party and to no other. Consequently, it follows that one co-accused can cross-examine a witness called by another Co-accused only when the case of the second is adverse to that of the first. *21 Cat. 401.*

(3) The rule of English law in this respect is different. Under the English law the right of a defendant (and *a fortiori* an Accused) to Cross-examine a co-defendant or co-accused is, according to the English-cases, is unconditional and not dependent upon the fact that the cases of the accused and co-accused are adverse or that there is an issue between the defendant and his co-defendant. And one co-defendant may Cross examine a co-defendant's witness and the co-defendant if he gives evidence.

The reasons for this English rule are :

(i) It is settled that the evidence of one party cannot be received as evidence against another party unless the latter has had an opportunity of testing it by Cross-examination. *Allen* vs. *Allen. L.R.P.D. (1894) 248/254.*

(ii) It is also Settled that all evidence taken, whether in examination-in-chief or Cross-examination, is common open to all the parties. *Lord* vs. *Coloin. 3 Drewery 222.*

(iii) It follows that if all evidence is common and that which is given by one party may be used for or against another party, the latter must have the right to Cross-examine.

7. What is the effect of a default in the course of the examination of a Witness prescribed by law ?

(1) This question can arise only when there is a default in Cross examination or Re-examination. Until there is Examination-in-Chief, there

is no evidence at all in the legal sense of that term.

It is only when evidence has been given by the witness in his Examination-in-Chief that this question can arise. The question to be considered reduces itself to the effect of default of Cross-examination or Re-examination on the testimony of a witness.

(2) Such default takes place when the witness dies or falls ill, becomes insane or paralytic or disappears after his Examination-in-Chief or before X Examination.

(3) The Evidence Act does not in clear terms state in express terms what the effect will be. Whether, for want of Cross-examination or Re-examination of a witness, his testimony given in Examination-in-Chief will cease to be evidence in the legal sense of the word and will have to be cancelled and excluded from the consideration of the Court or whether it will merely affect its evidentiary value, is not stated in the Evidence Act. The question is determined by Judicial interpretation.

According to judicial interpretation, two propositions are well established.

(1) Such default does not make the evidence inadmissible. It only affects its credibility.

(2) Whether it would be credible or incredible, must depend upon the reasons for the default in Cross-examination.

There are two ways in which default in X Examination may take place:

(i) Where a party could have X Examined but did not do so. (ii) Where a party would have X Examined but could not do so.

The question of credibility could arise only in the second case. It could not arise in the first. The Law can give an opportunity and nothing more. If opportunity is not taken, the law holds there is no injury.

§ Regular Course of Examination

1. The Course of examination of a witness must be *regular.*

2. A Course of Examination to be *regular* must be in accordance with the rules laid down in the Evidence Act ?

3. The rules for a Regular Course of Examination relate to :

(i) Scope of Examination.
(ii) Manner of Examination.
(iii) Limits of Examination.

§ Scope of Examination of a witness

Under this head, we must deal with matters on which it is permissible to a party to ask questions to a witness.

1. The objects underlying the examination of a witness are chiefly two: (i) to elicit from him what he knows. (ii) to test the truth of what he states.

2. The object of testing the truth of what the witness has stated can be achieved, only if, the Examination of the witness is extended to such questions as relate : (i) to the corroboration and contradiction of the witness.

(ii) to the confirmation or impeachment of the credit or character of the

witness.

3. Under *Scope of examination,* we shall therefore be concerned with Rules relating to the following subjects :

(i) Rules relating to matters which can or cannot be elicited in the course of the Examination of the witness.

(ii) Rules for testing the credibility or incredibility of a witness.

(iii) Rules regarding the corroboration or contradiction of matters deposed to by the witness.

l§ Matters which can or cannot be elicited in the course of an Examination

1. This question is dealt with by Sections 138 and 146. The effect of these sections is that there are two kinds of matters which can be elicited from a witness in the course of his examination.

(i) Matters which are relevant to the issue and (ii) Matters which relate to the credibility of the witness.

These are the only two matters on which a witness can be examined.

2. But every party is not entitled to examine a witness on both these matters

(1) With regard to matters which are relevant, both parties are entitled to examine the witness, the party who called him and the adverse party. Indeed the rule is not that the party is entitled to examine the witness on all relevant matters ; the rule is that the examination of a witness must be confined to relevant facts.

This rule applies not only to Examination-in-Chief but also to Cross-examination. The only difference is that Cross-examination need not be confined to matters raised in Examination-in-Chief. It may be extended to other matters not raised in Examination-in-Chief. But these other matters must also be *relevant* matters. Nothing that is irrelevant is permissible either in Examination-in-Chief or Cross-examination.

There is therefore no difference in the scope of the Examination-in-Chief or Cross-examination so far as relevant matters are concerned.

(Here concludes Page 203 of the M.S. Page 204 is missing. Following text starts from Page 205—ed.)

There is agreement on the absence of the particular virtue of truth telling has the necessary effect of shaking the man's credit and therefore such questions as relate to this aspect of the witness character are always permissible and can be asked in Cross examination.

But there is no general agreement as to the absence of general good character on the veracity of a witness.

There are two views on the subject. One is that, bad general character necessarily involves an impairment of the truth telling capacity and therefore to show general moral degeneration is to show an inevitable degeneration in veracity. The other view is, a bad general disposition does not necessarily or

commonly involve a lack of veracity and that, therefore, a bad general disposition is of no probative value for the purpose of shaking a witness's credit.

Under the English law, for the purposes of shaking credit by injury to character, general character is excluded and character for veracity only is taken into account.

§ Impeachment of Character otherwise than by Cross-examination

Section 155

1. Impeachment of character of a witness is permitted by the production of independent evidence under the provisions of Section 155.

2. *This again is a right of the adverse party.* So that a party who calls a witness cannot impeach the character of that witness by evidence of other persons.

3. *The impeachment may be undertaken in the following ways* .

(1) by evidence of persons who testify from personal knowledge that the witness is unworthy of credit.

(2) by proof that has been bribed or accepted the offer of a bribe or has received other corrupt inducement to give his evidence.

(3) by proof of former statements *inconsistent* with any part of his evidence which is liable to be contracted.

(4) by proof in rape that the prosecutrix was of generally immoral character.

3 § Rules regarding corroboration and contradiction of a witness

1. *Definition of a Corroborative Evidence*—Corroborative evidence simply means evidence which has the effect of confirming the truthfulness of the testimony of a witness. It is evidence which makes the assurance of a witness doubly sure.

2. *Kinds of Corroborative Evidence.*—The Evidence Act recognises two kinds of Corroborative Evidence. (i) Evidence of facts other than relevant facts. (ii) Additional evidence of.

***Section 156.* § Corroborative Evidence of facts other than relevant facts**

There are two requirements which must be fulfilled.

(i) The Corroborative circumstance of which evidence is being given must have been observed by the witness *at or near to the time* at which the relevant fact occurred.

(ii) The Court must be of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact

Illus.

A and B jointly committed robbery at a certain place. B is charged and A, the accomplice gives evidence against him. In his evidence A describes various incidents unconnected with the robbery which occurred

on the way.

Prosecution call independent witnesses to prove the truth of the testimony of the accomplice relating to the *incidents on the way.*

The relevant question is whether *B* committed robbery. The Evidence tendered by the prosecution does not relate to the relevant question. Still it will be allowed as a corroborative evidence if the Court is of opinion that it will help to corroborate the testimony of the accomplice as to robbery.

§ Corroborative Evidence byway (of)* Additional Evidence of relevant facts

Section 157.

1. *This can be done by giving evidence of any former statement made by the witness relating to the same fact.* This is based upon the principle that he, who is consistent, deserves to be believed. The mere fact of a man, having on a previous occasion made the same assertion, may add little or nothing to the truthfulness. One may persistently adhere to falsehood once uttered, if there is a motive for it so that if consistency was conclusive nothing would be easier for designing and unscrupulous persons to procure the conviction of any innocent man, who might be obnoxious to them, by first committing offences and afterwards making statements to different people and at different times or places implicating the innocent man. *R.* vs. *Malappa, 11 Bom. H. C.R. 196 (198).*

2. The previous statement may be a statement made on oath or otherwise and either in ordinary conversation or before some persons who had authority to investigate and question the person who made it. It may be verbal or in writing. *There is one distinction between a previous statement made before a person who has authority to investigate and a previous statement* made before a person not so authorised. If not made before any person legally complain to investigate the fact, then to be admissible, must have been made at or about the time when the fact took place. This condition does not apply to a previous statement made before a person having authority to inquire.

25 Mad. 210. Illus.

(i) A statement by a girl, alleging that she was raped made immediately after the rape, is admissible.

(ii) The dying declaration of a man, who chances to live, is admissible as a corroborative piece of evidence.

(iii) The first information given to the police is admissible as corroborative evidence of the testimony of the informant.

(iv) The Panchnama is admissible as a corroborative. *Two points must be urged by way of caution.*

(1) The use of statements made to the police in the course of investigation under Section 162, Criminal Procedure Code. These are also *previous statements* made before a person who is authorised to investigate.

Can they be used for the purposes of corroboration ?

At one time it was held that they could be so used.

36 Cal. 281.
35 Mad. 397.
39 Bom. 58.

The Amendment to Section 162 of the Criminal Procedure Code excludes both the written record and *viva voce* statement made to the Police. Though previous statements, they cannot be used as a corroboration.

(2) The distinction between corroborative evidence and substantive evidence is important, because, on this depends the use of corroborative evidence. Corroborative evidence is not substantive evidence.

Illus.

In a trial of a prisoner, the depositions of witnesses given in a previous trial of other persons charged with having been engaged in the same offence, were used against him. The witnesses instead of being examined in the ordinary way, were re-sworn and said " I gave evidence before in this Court and that evidence is true ".

Held that this evidence was inadmissible. It was only corroborative evidence and could be used only when substantive Evidence is given. If substantive Evidence is not given, then corroborative evidence cannot be given.

12W.R.Cr.3.

Similarly—If a panch does not identify the accused, the Panchanama of identification as corroborative evidence could be inadmissible.

In this connection there arises the question of giving corroborative evidence of a person who cannot be called to give substantive evidence by reason of the fact that the witness is deader who cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense, which under the circumstances the Court thinks unreasonable.

Section 158 permits corroborative evidence being given although no substantive evidence is tendered. This is an exception to the general rule. That exception applies only *if the witness cannot be procured.*

This is an exception created by Statute. Another exception created by Statute is contained in Section 288 of the Criminal Procedure Code. By that Section, evidence before the committing Magistrate is treated as evidence before the Sessions Court for *all* purposes i. e. substantive Evidence of all facts deposed therein.

§ 3/2 § Rules regarding the contradiction of a witness

1. This is a matter which must necessarily be governed by two considerations:

(i) The object of inquiry by the Court is to get at the truth and therefore contradiction must be permitted.

(ii) If contradiction is permitted, the inquiry will be endless and therefore

there must be some limit on the process of contradiction.

2. *In what cases can a witness be contradicted ?*

The Section which deals with the contradiction of a witness is Section 153. For the purposes of contradiction, the Section divides the answers of the witness into two classes (1) Answers to questions relating to relevant facts and (2) Answers to questions relating to the credit of a witness.

3. *Are the answers of a witness to questions relating credit liable to contradiction ?*

The answer given in Section 153 is positive to the effect that such answers shall not be contradicted.

There are only two exceptions to the rule :

(i) If previous conviction is denied, you can contradict it by evidence. (ii) If the witness denies partiality he may be contradicted.

In this connection, it must be borne in mind that under the provisions of Section 155, the answers of a witness giving reasons in X-Examination for his belief in the untrustworthiness of another witness are not liable to be contradicted.

In all these cases, where the answers of a witness to questions relating to credit are not liable to contradiction, the law provides that if their answers are false they may afterwards be charged with giving false evidence.

4. Are answers of a witness to questions on relevant facts liable to contradiction ?

(1) Section 153 is negative in character and merely states cases in which contradiction is not allowed. It does not state in what cases contradiction will be allowed.

(2) It does not include answers to relevant questions in its prohibition. By implication it seems to permit contradiction of such answers.

(3) There is illustration (c) to Section 153 which shows that the legislature intended to permit contradiction of such answers.

5. Section 153, therefore, lays down the rule that you can contradict answers to relevant questions. But you cannot contradict answers to questions on credit.

§ Contradiction on relevant facts

1. The next question is ; *Is such contradiction permitted to the party who called the witness or Is it permitted to the adverse party only ?*

2. That, a party may contradict the answers given by the witness called on behalf of the adverse party, is beyond question and is always permissible. The defence witnesses are thereto contradict. But it does not seem to be quite so obvious in the other case. A witness is called on behalf of a party. In answer to a question on a relevant fact, he gives a particular answer which the party who called him feels is untrue. Can the party, who called him, call another witness to contradict him ?

3. *The answer is that he can.* The law seems to make difference between

discrediting his own witness by attacking his general character and showing that in a particular respect his testimony is incorrect.

§ Manner of Examination of a Witness

1. *Manner of Examination means the manner of interrogating the witness,* i. e. the manner of putting questions.

2. This matter is left not to the discretion of the party interrogating the witness, but is regulated by law.

3. From the standpoint of the manner of putting questions, questions are either leading questions or not leading questions.

4. A leading question is generally said to be a question which can be answered by a mere yes or no. Although, all such questions undoubtedly come within the rule, the character of leading question is not limited to them.

The Evidence Act defines a leading question as one, which suggests a particular answer, which the questioner expects to have from the witness.

Illus.

On a charge for murder by stabbing, to ask a witness ' Did you see the accused covered with blood and with a knife in his hand coming away from the corpse ? ' is a leading question.

5. A distinction must be made between two sorts of leading questions,

(i) A leading question which suggests the answer. (ii) A leading question which directs the attention of the witness to the *subject* respecting which he is questioned.

As an illustration of the second sort of leading question, take the following:

A was sued for defamation *by B* for having said in a conversation to C that B was in bankrupt circumstances and that his name would appear in the London Gazette among bankrupts. Question was asked to the witness.

" *Was anything said about the Gazette ? "*

This is not a leading question in the sense of a question which suggests an answer. It is a leading question which directs the attention of the witness to the *subject* about which he is being questioned.

The manner of interrogation in Examination-in-Chief varies from the manner of investigation in Cross-examination.

In Cross-examination, a witness may be interrogated in the form of leading questions. But leading questions must not be asked in Examination-in-Chief, if objected to by the opposite party.

In Examination-in-Chief, the witness must be asked merely such question as " What did you see ? " " What did you hear ? " " What happened next ?"

Reasons for the Rule

(1)A witness has a bias in favour of the party calling him and hostile to the opponent. He is, therefore, likely to agree to the answers suggested to him by the pleader of the party.

(2) That the party calling a witness has an advantage over his adversary, in knowing before hand what the witness will prove, or at least expected to

prove ; and that, consequently, if he were allowed to lead, he might interrogate him in such a manner as to extract only so much of the knowledge of the witness as I would be favourable to his side, or even put a false gloss upon the whole.

Exceptions to the Rule.

Leading questions are permissible in Examination-in-Chief in the following cases :—

(i) Where the matters are merely introductory, such as a name, occupation of a witness.

(ii) Identification of persons or thing.

(iii) About matters which are not in dispute.

(iv) When a question from its very nature cannot be put except in a leading form.

(v) To contradict evidence already given by a witness on the other side.

E. G.—If the Plaintiff has sworn that the defendant said, " The goods need not all be equal to sample ", the Defendant can and should be asked, " Did you ever say to the Plaintiff that the Goods need not all be equal to sample or any other words to that effect ? "

(vi) Where the witness is hostile. Difference between a hostile and a witness who is unfavourable.

A Witness should always state what happened according to his own personal recollection, and not according to what he has since been told.

Suppose the witness cannot recall the facts and his memory fails, what is to be done ?

There are two ways open :

(1) To assist the memory of a witness by leading questions.

(2) To permit him to refresh his memory by permitting him to refer to any writing which is a record of the fact.

Examples of writings used to refresh memory are—

(i) Entries in diaries. Entries in call books. Entries in account-books. Entries in Railway time-tables.

A witness may refresh his memory by referring to any writing or document *made by himself.* But he may also refresh his memory from documents made by other persons under his immediate observation.

The only condition is that the document must have been made at the time when the transaction was fresh in his mind or was *read by him,* if made by another person, at the time when the transaction was fresh in his memory and knew it to be correct.

A copy may be used if the original cannot be produced for reasons which satisfy the Court for its non-production.

Refreshing memory by inspecting a writing or document does not make it documentary evidence. So that a document which could be inadmissible in

evidence for want of stamp would be admissible for refreshing memory.

There is a difference between referring to a writing for refreshing memory and using a document for corroboration.

A document which could not be used for corroboration can be used for refreshing.

Example : USE OF POLICE DIARIES

In connection with a document used for refreshing memory, it must be ascertained whether a memorandum does assist the memory or not.

The law, therefore, requires that such writing shall be produced and shown to the adverse party, if he requires it and he may cross examine the witness thereupon, if he so desires.

8 Cal. 739 (745).

The grounds upon which the opposite party is permitted to inspect are threefold : (i) to secure the full benefit of the witness 's recollection as to facts ; (ii) to check the use of improper documents and (iii) to compare his oral testimony with his written word.

Can the adverse party compel the witness to refresh his memory by referring to the writing.

It may be very advantageous to an accused person that Police Officer should state a certain fact. The Police Officer does not recall fact and would not refresh his memory by reference to his diary.

(8 Cal. 154), (8 Cal. 739) Says he cannot be compelled. *A. I. R. (1924) Pat. 829,* Says he can be compelled.

§ On the Limitations on the Examination of a witness

1. The subject-matter to be considered under this head relates to the questions a witness is bound or is not bound to answer.

2. The general rule is that a witness must answer *all* questions put to him.

Section 132, Section 132 puts the matter negatively.

3. This rule is subject to *two* qualifications : (i) Certain questions a witness cannot be *compelled* to answer. (ii) Certain questions a witness is not to be empowered to answer.

4. Sections which deal with questions which cannot be *compelled* to answer are : 121,122, 124,125,129.

5. Sections which deal with questions which a witness is not empowered to answer are : 123, 126, 127, 128.

DISCHARGE OF THE BURDEN OF PROOF

1. Effect of Evidence may be : (i) To prove a fact. (ii) To disprove a fact. (iii) To fail to prove and therefore disprove.

2. Burden of Proof is discharged when : (i) The fact required to be proved is prove. (ii) The fact required to be disproved is disproved.

3. Burden of proof is *not* discharged when the Party on whom the Burden lies fails to prove or disprove as the case may be.

4. When can a fact be said to be proved or disproved ? And when can it be said to be not proved.

The answer to this question is given in section 3.

NOTE.—TWO things must be noted.

(i) Proof does not mean rigid mathematical demonstration. (ii) Moral conviction is not proof.

Proof means Evidence.

But such evidence as would induce a reasonable man to come to some conclusion. *(1911) 1. K. B. 988 (995). 31 Bom.* L. *R. 516.*

The question of proof is one of probability and not of certainty.

Discharge of Burden of Proof and Quantum of Evidence

(1) Under the English Law corroboration is necessary in certain cases:

(1) High Treason—Two witnesses.

(2) Perjury—

(3) Breach of Promise—

(4) Bastard—Mother's testimony must be corroborated.

(II) Under the Indian Law the rule is absolute. The Court may act on the testimony of a single witness even though uncorroborated.

Exception. ***

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